APPENDIX A

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of September one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,
Circuit Judges.

VITO GENOVESE,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 CIV. 1299

VITO GENOVESE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

OPINION

Appearances:

ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Attorney for the United States of America
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POLLACK, D. J.

The petitioner was convicted in 1959 of conspiracy to violate the narcotics laws and was sentenced to imprisonment for 15 years and fined $20,000. The petitioner now moves under 28 U.S.C. §2255 for release from custody on the

ground that the trial judge failed to instruct the jury clearly that knowledge of illegal importation of narcotics was an essential element to be established against the petitioner.

This is the second application by the petitioner under 28 U.S.C. §2255 challenging the sufficiency of the charge to the jury. The prior petition was denied two years ago, 269 F. Supp. 616 (S.D.N.Y. 1966, Weinfeld, J.), and the denial thereof was affirmed, 378 F. 2d 748 (2 Cir. 1967, Opin. *per* Moore, C. J.).

The first petition was denied on the ground that there was more than ample evidence of petitioner's constructive possession to permit a finding of his knowledge of illegal importation of the narcotics. Additionally, as Judge Weinfeld pointed out on the prior application:

> "Petitioner makes a further attack based on the trial judge's instructions upon the ground that they did not require the jury 'to find such knowledge in order to return a verdict of guilty of conspiracy to violate 21 U.S.C. §§173, 174.' . . . He then read the charging paragraphs of the indictment . . . And, after his general instructions on the law of conspiracy, the jury was instructed:
>
> > 'You may find those defendants guilty who joined the conspiracy with knowledge of its purpose and acquit those who did not join'." 269 F. Supp. at 619-20.

On the appeal from the denial of the first petition the Court of Appeals stated that:

> " . . . it is particularly significant to note that appellant has heretofore obtained on his direct appeal to

> this court an unsuccessful review of his claim of insufficiency of evidence to support his conviction. See, United States v. Aviles, 2 Cir. 1960, 274 F. 2d 170, cert. denied, 1960, 362 U.S. 974 . . . This determination necessarily adjudicated the sufficiency of the evidence as to the individual elements of the crime." 378 F. 2d at 749-50.

The Court of Appeals further found, that there was ample evidence from which to infer the petitioner's knowledge of illegal importation and noted the petitioner's failure to request a specific instruction with reference to this matter or to object to the instructions as given.

The Court of Appeals held further that:

> "Reading the charge as a whole, the conclusion follows that the trial court *adequately informed the jury of the essential elements* necessary to constitute the crime of conspiracy under 21 U.S. C.A. § 174." 378 F. 2d 750. [Emphasis added].

The Court of Appeals also agreed with the observation of Judge Weinfeld that objection to the instructions was not available under § 2255, no constitutional issue having been presented. *Sunal* v. *Large,* 332 U.S. 174, 178-9 (1947); *United States* v. *Sobell,* 314 F. 2d 314 (2 Cir. 1963), *cert. den.,* 374 U.S. 857 (1963).

Petitioner's current application differs, if at all, from the previous one only in that it alleges that the Court failed to instruct the jury with respect to *each defendant's* knowledge of illegal importation.

Petitioner claims that subsequent to the affirmance of Judge Weinfeld's decision, the case of *Mason* v. *United States,* 333 F. 2d 107 (10 Cir. 1967), made the instructions in the case at bar inadequate as matter of law. This claim lacks merit.

In *Mason,* the Court reversed a narcotics conviction because the charge to the jury did not explain that possession necessary to satisfy the statutory presumption of knowledge of illegal importation must be established separately for each defendant. While the trial judge did charge the statutory presumption, he did not state that the evidence in a multi-party trial must show that *each* defendant had the requisite knowledge and this could not be imputed from one defendant to the others.

In this case the trial judge did not charge the stautory presumption at all and hence it was unnecessary to give the cautionary instructions that specific knowledge by one defendant may not be imputed to another and that the evidence must show that each defendant had specific knowledge. In this case there was no ambiguity involved in the charge. The trial judge stated repeatedly that the evidence must show that each defendant is guilty beyond a reasonable doubt of each of the elements of the crime charged in the indictment and that the evidence must show that each defendant had knowledge of illegal importation. In addition to those instructions already quoted, the jury was told that

> "Under our system of law the guilt or innocence of each defendant is an individual matter . . . [and depended on] his own connection with the actions and conduct of the others." Record, p. 1066a.

The Judge further told the jury that

> ". . . you should . . . determine separately with respect to each defendant whether or not he knowingly and wilfully became a member of the conspiracy . . ." Record, p. 1067a

and that the jury must consider

> ". . . with reference to each defendant separately whether or not he or she knowingly and with willful intent became a member of the conspiracy." Record, p. 1064a

The trial judge herein read to the jury, the charging paragraphs of the indictment which enumerated various conspiratorial purposes and the element of the criminal enterprise, among them that:

> ". . . defendants . . . would receive . . . buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs . . . after the said narcotic drugs had been imported and brought into the United States, contrary to law, *knowing* that the said narcotic drugs had been imported and brought into the United States contrary to the law in violation of Sections 173 and 174 of Title 21, United States Code." Record, p. 1060a. [Emphasis added].

The Judge then told the jury that the statute under which the indictment was drawn made it unlawful for any person to "facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . ." Record, p. 1062a.

And just before the charge was concluded the Judge again reminded the jury that "It is your duty to give separate, personal consideration to the case of each individual defendant. . . . guilt is personal and that each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him." Record, p. 1136a.

In the light of the sufficiency of the evidence of defendant's knowledge and the unambiguous instruction that guilt was personal, to be determined separately for each individual, and in the light of the ruling of the Court of Appeals in this case that the charge was sufficient in every respect, the present application cannot be entertained.

The petitioner has had post-conviction review by two District Courts and three Courts of Appeal; the United States Supreme Court has denied certiorari twice, once following a remand. If petitioner's claim is old, it has been disposed of and lacks merit at all events. If it is new, it lacks merit and alternatively it is not reviewable under §2255.

The motion is, in all respects, denied.

So Ordered.

Milton Pollack
U.S.D.J.

May 15, 1968

APPENDIX C

Statutes Involved

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 39.
Costs

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) *Costs For and Against the United States.* In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the pro-

visions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) *Costs of Briefs, Appendices, and Copies of Records.* The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

(d) *Clerk to Insert Costs in Mandate.* The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the court of appeals.

(e) *Costs on Appeal Taxable in the District Courts.* Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

28 U.S.C. § 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.